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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment to the Commission's Rules) WT-Docket No. 96-6
To Permit Flexible Service Offerings)
in the Commercial Mobile Radio Services)

REPLY COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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**REPLY COMMENTS OF
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The Cellular Telecommunications Industry Association ("CTIA")¹ submits its Reply Comments in the above-captioned proceeding. As stated in its Comments, CTIA supports the Petition for Partial Reconsideration or Clarification filed by BellSouth Corporation ("BellSouth") in this docket.²

I. INTRODUCTION AND SUMMARY.

BellSouth requested that the Commission delete Section 22.323 of its Rules in accordance with the Commission's Report and Order permitting flexible service offerings by CMRS

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

² Amendment to the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, BellSouth Petition for Partial Reconsideration or Clarification (filed September 30, 1996) ("BellSouth Petition"). Public comment on the BellSouth Petition was invited on September 25, 1997 (DA 97-2083).

providers.³ BellSouth argued, and CTIA agreed, that Section 22.323 is inconsistent with the Report and Order.

CTIA and three other parties filed comments in this proceeding. AT&T Wireless and GTE Service Corp. filed comments in support of BellSouth's Petition.⁴ Cellular Mobile Systems of St. Cloud General Partnership, LLP ("CMS") filed comments urging the Commission to retain Section 22.323 of its Rules. CMS is concerned that, although fixed services provided on an incidental basis pursuant to Section 22.323 are considered a "mobile service" and are regulated under Section 332 of the Communications Act of 1934, as amended ("the Act"),⁵ such services provided on a co-primary basis under Section 22.901 may not be regulated as mobile services.⁶ As CMS notes, this issue is currently pending in this Docket.

CMS has raised an important issue that goes to the very heart of this proceeding: (1) whether the Commission should retain Section 22.323 (regarding incidental services) as consistent with the Section 22.901 (co-primary) standard and the Report and Order; and (2) whether the Commission should apply a Section 332 regulatory regime to the provision of fixed services,

³ Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8965 (1996) ("Report and Order").

⁴ GTE Service Corp. suggested that the Commission retain the ability to monitor and control "incidental" service use of the air-ground spectrum block by maintaining the incidental service rules for only air-ground services.

⁵ 47 U.S.C. § 332.

⁶ Comments of CMS at 4.

on a co-primary or any other basis, by CMRS providers utilizing mobile spectrum.

II. THE QUESTIONS RAISED BY CMS SHOULD RECEIVE QUICK, POSITIVE RESOLUTION.

Prior to the Report and Order, the Commission's Rules allowed CMRS licensees to provide some forms of fixed services on their mobile spectrum on an "ancillary," "auxiliary," or "incidental" basis. As the Commission noted, these terms had never been defined and had caused uncertainty among carriers which were hesitant to take advantage of the flexibility offered without seeking further guidance from the Commission.⁷

In the Report and Order, the Commission attempted to prevent this confusion by eliminating the terms "ancillary," "auxiliary," and "incidental" and modifying its CMRS rules to permit CMRS spectrum to be used "on a co-primary basis for fixed services, mobile services, or any combination of the two."⁸ However, the Commission neglected to eliminate the term "incidental" from Section 22.323 of its Rules.

The CMS Comments demonstrate the problem of maintaining both Section 22.323 and Section 22.901. In opening this proceeding the Commission sought to make it clear that carriers could use their spectrum on a much broader basis. By retaining both provisions, and the possibility that they will be governed under

⁷ Report and Order at ¶ 8.

⁸ Id. at ¶ 2 (emphasis added). The Commission realized that allowing CMRS providers to provide fixed services without restriction would not result in limiting capacity for mobile services. Id. at ¶ 21.

separate regulatory regimes, the Commission has not, in effect, achieved a complete resolution of the relevant issues. There remains confusion as to what level of fixed or alternative cellular technologies CMRS carriers may provide on their mobile spectrum without having to seek the Commission's guidance as to how those services will be regulated. Simply stated, the confusion over the provision of incidental, ancillary, and auxiliary services remains. This confusion will inevitably result in carriers being forced to limit the provision of their service to coincide with the most favorable regulatory regime. The resolution of this conflict seems clear: implement a CMRS-based regulatory structure for the provision of all fixed services in the CMRS bands.

III. FIXED SERVICES PROVIDED BY CMRS PROVIDERS ON A CO-PRIMARY BASIS SHOULD BE REGULATED UNDER SECTION 332 OF THE ACT.

To prevent the type of confusion caused by the maintenance of both Sections 22.323 and 22.901, the Commission should mandate that all fixed services provided in the CMRS band be regulated as mobile services under Section 332 of the Act. To do so would avoid the incidental/co-primary confusion discussed above and permit the Commission and CMRS providers to realize the goals of the *Flexible Use* proceeding. Moreover, the Commission has clear authority to regulate the provision of fixed services by CMRS providers as mobile services under Section 332 of the Act and sound public policy supports such a result.

A. The Commission May Include the Provision of Fixed Services Under the Definition of Mobile Services.

As noted throughout this proceeding, Congress granted the Commission sufficient latitude to define mobile services to also include fixed services.⁹ Congress did so by giving the Commission express authority to classify which services should be considered "personal communications services," as well as to establish alternative definitions of "mobile services" in successor proceedings.¹⁰ In its 1993 revision to the "mobile service" definition, Congress supplemented the existing definition to include "any service for which a license is required in a personal communications service. . . ." ¹¹

As such, the term "mobile service" includes those services which may be offered by PCS licensees as determined by the Commission in the PCS docket or any successor proceeding. By specifying the services which may be offered by PCS licensees, the Commission has already modified the definition of "mobile services" subject to Section 332.¹² Indeed, having determined

⁹ See e.g., Comments of CTIA and Reply Comments of CTIA in this docket (filed March 1, 1996, March 25, 1996, November 25, 1996 and December 24, 1996).

¹⁰ See 47 U.S.C. § 153(27). See also Report and Order at ¶ 50.

¹¹ 47 U.S.C. § 153(27) (emphasis added).

¹² The Commission has said that it envisions "PCS providers offering a broad array of services, including services that could potentially extend, replace, and compete with wireline local exchange service." Such services "may be delivered using a system architecture that is mobile or fixed, or that combines mobile and fixed components. Report and Order at ¶ 6 (emphasis added) (citing Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676, 5681 (1992).

that CMRS providers, including PCS licensees, may provide fixed services on a co-primary basis, the Commission has effectively found that fixed services offered by CMRS providers are "mobile services" and are therefore subject to regulation as CMRS under Section 332.

The maintenance of the term "incidental" in Section 22.323 for cellular carriers was clearly an oversight. The Commission's Rules regarding the provision of fixed services by SMR or PCS providers contains no "parallel" provision regarding "incidental" services. To maintain this provision with respect to cellular carriers would clearly be discriminatory. Principles of regulatory parity require that this section be deleted or modified to be consistent with Section 22.901(d) and all other like sections that apply to CMRS providers.¹³

Regulatory parity for similarly situated CMRS providers was Congress' intent when it amended Section 332 in 1993. Congress amended Section 332 to ensure that "services that provide equivalent mobile services are regulated in the same manner."¹⁴ Congress specified that all services which PCS licensees are entitled to offer are included in the definition of "mobile services."¹⁵ Therefore, services provided by all CMRS providers, not just PCS providers, must come within the definition of

¹³ See e.g., 47 C.F.R. § 24.3 (PCS); 47 C.F.R. § 90.419 (SMR).

¹⁴ H.R. Rep. No. 111, 103d Cong., 1st Sess. 22 (1993) at 259 ("House Report").

¹⁵ CTIA reiterates its position that there is no evidence that Congress intended to include only those PCS services which use a "mobile station."

"mobile service." Maintaining Section 22.323 for the provision of incidental cellular services violates these principles.

B. Public Policy Goals are Realized by Regulating the Provision of Fixed Services by CMRS Providers under the Section 332 Mobile Services Regime.

If CMRS provision of fixed services is determined to be outside the CMRS model established in Section 332, the creation and development of new fixed services as contemplated in this proceeding will not be realized. The record demonstrates that very real public benefits will result from applying Section 332 regulation to the provision of all fixed services offered by CMRS providers. For example, in the Report and Order, the Commission found the "public interest would be served by giving licensees maximum flexibility in the uses of the CMRS spectrum."¹⁶ Indeed, such flexibility, the Commission determined, would "allow CMRS providers to better respond to market demand and increase competition in the provision of telecommunications services."¹⁷

Furthermore, the Commission found that limiting the potential use of CMRS spectrum to specific applications "could lead to difficult definitional questions."¹⁸ Ironically, the resolution of difficult definitional questions (specifically, what is "incidental") was a primary purpose of the *Flexible Use* proceeding and is the exact basis for the current conflict. The Commission will continue to face these issues if it maintains both Sections 22.323 and 22.901 of its Rules and establishes

¹⁶ Report and Order at ¶ 1 (emphasis added).

¹⁷ Id.

¹⁸ Id. at ¶ 19.

different regulatory paradigms for these two sections. Carriers' flexibility will be limited because of a limiting regulatory regime. Rather, the Commission should use this opportunity to implement a uniform Section 332 regime for the provision of all fixed services in the CMRS band.

The Commission in the Report and Order was concerned that restricting fixed uses to specific configurations might cause carriers to "be reluctant to pursue some potentially efficient options out of concern that they would be considered to fall outside the definition of our prescribed service definition."¹⁹ The Commission was especially concerned that "regulatory restrictions on use of the spectrum could impede carriers from anticipating what services customers most need, and could result in inefficient spectrum use and reduced technological innovation."²⁰ Preserving a separate regulatory regime under Rule 22.323 seems counter to achieving these Commission objectives. Unless the provision of fixed services on a co-primary basis by CMRS providers is regulated under Section 332, and Rule 22.323 is eliminated accordingly, carriers may be forced to limit their service offerings in order to avoid the burdens associated with a fixed regulatory regime.

¹⁹ Id.

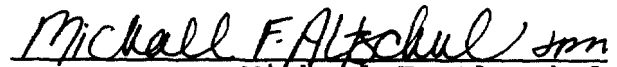
²⁰ Id. at ¶ 22.

IV. CONCLUSION

For these reasons, CTIA respectfully requests that the Commission grant BellSouth's Petition and eliminate Section 22.323 of its rules and order that all services provided in the CMRS band will be regulated as mobile services under Section 332 of the Act.

Respectfully submitted,

**CELLULAR TELECOMMUNICATIONS
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December 12, 1997

CERTIFICATE OF SERVICE

I, Dennette Manson, do hereby certify that on this 12th day of December, 1997
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